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In the Supreme Court of the United States

No. 335

..... Term, 19 .....

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR CERTIORARI
AND
BRIEF IN SUPPORT OF SAME

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In the Supreme Court of the United States

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COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

(PETITION FOR CERTIORARI)

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands in the case of Compañia General de Tabacos de Filipinas, plaintiff-appellee, versus Collector of Internal Revenue, defendant-appellant. The decision of the Supreme Court of the Philippine Islands was promulgated December 6, 1927 (R. 20); final judgment was entered February 9, 1928 (R. 60), two Justices dissenting.

Your petitioner submits the following summary and

short statement of the matter involved and the reasons relied on for the allowance of the writ.

STATEMENT

I

On October 17, 1925 (R. 1) petitioner filed in the Court of First Instance of the City of Manila in the Philippine Islands its complaint in an action commenced to recover from the respondent Collector of Internal Revenue the sum of ₱12,009.-75, Philippine currency, paid to said respondent under protest as an internal revenue tax upon income derived from sales of Philippine products in the United States.

II

Said complaint avers in substance that petitioner is a corporation organized and existing under the laws of the Kingdom of Spain duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila; that respondent is the Collector of Internal Revenue for the Philippine Islands; that petitioner during the year 1922 exported from the Philippine Islands and sold in the United States of America certain quantities of merchandise at a profit; that the respondent, pretending to act under the provisions of Act 2833, as amended by Act 2926 (Philippine Income Tax Law) unlawfully assessed against, and collected from peti-

tioner the sum of twelve thousand and nine and 75/100 pesos (₱12,009.75) as a tax of three (3%) per cent on the amount of the profits earned by petitioner from the sales of said merchandise in the United States of America during the year 1922; that petitioner, in order to avoid the infliction upon it of fines and penalties and the distraint of its property, paid said sum under protest in writing; and that respondent denied said protest and refused and failed to return said sum to your petitioner.

III

The prayer of the complaint (R. 4) was for judgment for the said sum so paid to said respondent with costs.

IV

On November 18, 1925, the Attorney-General of the Philippine Islands filed an answer on behalf of respondent (R. 4) wherein it was alleged among other things that the taxes sought to be recovered by petitioner were lawfully levied, assessed and collected under the provisions of said Acts 2833 and 2926.

V

On January 22, 1926 your petitioner filed an amended complaint (R. 6) to meet certain minor objections to the original complaint raised by respondent's answer.

VI

The cause was heard and determined on an agreed statement of facts (R. 8), and on November 16, 1926 (R. 13) judgment was entered in said Court in favor of your petitioner, and against the respondent as prayed for in the complaint, without any express finding as to costs.

VII

Thereafter an appeal was taken by respondent to the Supreme Court of the Philippine Islands and the case was duly docketed in said Court on April 30, 1927 (R. 19).

VIII

On December 6, 1927 the Supreme Court of the Philippine Islands rendered its decision whereby it reversed the judgment of the lower Court (R. 20).

IX

On December 20, 1927 petitioner filed a motion for a rehearing (R. 33) which was denied by the Supreme Court of the Philippine Islands on February 8, 1928, two Justices dissenting (R. 40).

X

On February 14, 1928, petitioner filed an exception to the order of the Supreme Court of

the Philippine Islands dated February 8, 1928, overruling the motion for reconsideration of the decision rendered in this case, and also to the final judgment entered therein, at the same time giving notice of its intention to apply to this Honorable Court for a writ of certiorari for the review of said decision and judgment of said court, and prayed that the Court retain therein the record of said cause pending the preparation of said petition and of the record to accompany the same (R. 61).

XI

On February 16, 1928, the Supreme Court of the Philippine Islands, acting on the exception and motion described in the preceding paragraph, passed the following resolution:

> "Considering the motion of the attorneys for the appellee in case R. G. No. 27766, Compañía General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, excepting to the order of this Court overruling the appellee's motion for the reconsideration of the decision heretofore rendered therein and to the final judgment entered in said case, and giving notice of appellee's intention to apply for a writ of certiorari to the Supreme Court of the United States of America for the review of said decision and judgment, and praying that the record of said case be retained in this Court pending the pre-

paration of the application for a writ of certiorari and of the proceedings to be had in the Supreme Court of the United States: Exception noted and the amount of the bond for the stay of the execution of judgment is hereby fixed at ₱1,000.00 to be filed with this Court within ten days from notice hereof and to be approved by Mr. Justice Johns, after hearing the defendant as to the sufficiency of the same and as to the solvency of its sureties." (R. 62.)

XII

On February 9, 1928, the final judgment of the Supreme Court of the Philippine Islands was entered as follows:

JUDGMENT

"The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the 6th day of December, A. D. nineteen hundred and twenty-seven.

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila dated the 16th day of November, nineteen hundred and twenty-six, and from which the above-en-

titled appeal was taken, be, and the same is hereby, reversed and the complaint dismissed, with costs for the defendant.

It is further ordered that the appellant recover from the appellee the sum of ₱40.00, as costs." (R. 60.)

XIII

Thereafter, in due time petitioner filed a bond in the amount of ₱1000.00 with the Clerk of the Supreme Court of the Philippine Islands, and said bond was approved by the Hon. Chas. A. Johns, Associate Justice of the Supreme Court of the Philippine Islands, in accordance with the resolution of said Court dated February 16, 1928 (R. 63).

REASONS FOR THE ALLOWANCE OF THE WRIT

Your petitioner urges the following reasons for the allowance of the writ of certiorari herein prayed for:

1. The pertinent language of section 10 of Act 2833, as amended by section 7 of Act 2926, is as follows:

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from ALL sources by every corporation * * * organized in the Philippine Islands, * * * a tax of

three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from *all sources within the Philippine Islands* by every corporation * * * organized, authorized, or existing under the laws of any foreign country." (Italics inserted.)

2. The Supreme Court of the Philippine Islands has held that the words "sources within the Philippine Islands", as applied to foreign corporations with branches in the Philippine Islands, embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.

The question involved is of public concern, affecting, as it does, the revenue of the Philippine Government and the income of all mercantile and trading foreign corporations with branch offices in the Islands engaged in selling the products of said Islands abroad.

The Supreme Court of the Philippine Islands has decided the case upon the theory that a foreign corporation with a branch office in the Philippines and doing business in said Islands should pay the same tax on profits derived from sales abroad as a domestic corporation is required to pay. Your petitioner is advised that said decision of the Supreme Court of the Philippine Islands is erroneous and repugnant to the whole scheme of the income tax law, for foreign corpo-

rations and domestic corporations are not on the same footing for taxation purposes.

The effect of said decision is to permit that which it was the object of the law to avoid, to wit, double taxation, for although taxes paid to the United States Government are allowable as a deduction to foreign corporations, no such deduction is allowed when the taxes are paid elsewhere.

The income derived from the transactions described in the instant case is taxable in the United States under the decisions and rulings of the Treasury Department as being "income from sources within the United States" (32 Opinions Atty. General of the United States 336; 5 Treasury Bulletin 1-39-519; Holmes, Fed. Taxes, 1923 Edition, p. 82; Holmes, Fed. Taxes, Sixth Edition, p. 416; 34 Opinions Atty. General of the United States 93), and that, accordingly, such income should not be considered in the Philippine Islands as "income from sources within the Philippine Islands".

The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and bear a reasonable relation to the difference in the base of the tax.

The said decision of the Supreme Court of the Philippine Islands lays down a different and much more onerous rule for foreign corporations

than for domestic corporations engaged in business of exactly the same kind or character, and works such an injustice as to call for an exercise of this Honorable Court's power of supervision.

Again, said decision conflicts with opinions of the Attorney General and of the Treasury Department of the United States in interpreting the Revenue Act of 1916 from which Act the section involved herein was taken by the Philippine Legislature.

Finally, the decision was reached by a divided Court, dissenting opinions having been written by Justices Johnson and Street (R. 40, 58).

WHEREFORE, and for the reasons set out at length in the brief filed herewith in support of this petition, petitioner prays that a writ of certiorari be issued to the Supreme Court of the Philippine Islands, commanding it to certify to this Honorable Court for its review and determination a transcript of the proceedings in said case, and that the judgment of said Court be reversed.

Respectfully submitted,

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Manila, P. I.,
June 20, 1928.

In the Supreme Court of the United States

No. .....

..... Term, 19 .....

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion rendered by the Supreme Court of the Philippine Islands the review of which is sought herein has not yet been published in the Philippine Reports, but it is printed in full in Volume XXVI of the Philippine Official Gazette at pages 1712, *et seq.*, and on pages 20 to 33 in the record accompanying this brief.

The separate dissenting opinions of Justices Johnson and Street likewise appear on pages 40 and 58, respectively, of the printed record.

The opinion of the Court of First Instance of the City of Manila is transcribed on pages 13 to 18 of the record.

STATEMENT OF THE CASE

A fair and concise statement of facts of this case is set forth in the opinion of the Supreme Court of the Philippine Islands, in the following words:

> "Plaintiff is a corporation organized and existing under the laws of the Kingdom of Spain, duly licensed to transact business in the Philippine Islands, with its principal office in the City of Manila. The defendant is the Collector of Internal Revenue.
>
> Plaintiff alleges that during the year 1922 it exported from the Philippine Islands and sold in the United States certain quantities of centrifugal sugar, manufactured tobacco, copra and coconut oil, at a net profit of ₱400,324.85. That the defendant, acting and pretending to act under the provisions of Act No. 2833, as amended by Act No. 2926, unlawfully and illegally levied and assessed against the plaintiff a tax of three per centum on the amount of such profit during the year 1922 amounting to ₱12,009.75, which plaintiff paid under written protest on the ground that the profit which it obtained from the sugar and tobacco sold by it in the United States was subject to the income tax levied by the government of that country. That no part of plaintiff's profit was derived from sources within the Philippine Islands.

That plaintiff's protest was overruled and denied, and defendant has refused to return the amount of such tax. Wherefore, it prays for a corresponding judgment, with costs.

For answer the defendant made a general and specific denial of all of the material allegations of the complaint, except that which is specifically admitted. Defendant admits paragraphs 1, 2, 3, and 5 of plaintiff's complaint, except as to the amounts, and alleges that the taxes which plaintiff seeks to recover were lawfully levied, assessed and collected under the provisions of Act No. 2833, as amended by Act No. 2926, and defendant prays that plaintiff's complaint be dismissed, with costs.

The case was tried and submitted upon the following "Agreed Statement of Facts":

"I

"That plaintiff is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

"II

"That defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

"III

"That plaintiff is the owner of several 'haciendas', sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in the exportation of the same, and that its business has been, and is being done mainly in the Philippine Islands.

"IV

"That the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of ₱114,226.80, Philippine currency.

"V

"That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands, which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of ₱296,341.19, Philippine currency.

"VI

"That, likewise, the plaintiff's Philippine branch, on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States, by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to ₱10,243.14, Philippine currency.

"VII

"That deducting the sum of ₱10,243.14, the losses mentioned in paragraph VI of this stipulation, from the sum of ₱410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of ₱400,324.85.

"VIII

"That the said net profit of ₱400,324.85, together with other gains, profits, or income were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc.

"IX

"That the defendant Collector of Internal Revenue, acting and pretending to act under the provisions of Act 2833 (Philippine Income Tax Law), as amended by Act 2926, levied and assessed against plaintiff a tax of three (3) per centum on the amount of the aforesaid net profits (₱400,324.85) earned by plaintiff, as recited in Paragraphs IV, V, and VI hereof, in the sum of ₱12,009.75, Philippine currency.

"X

"That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of

fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

"XI

"That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

"XII

"That the parties hereto reserve the right to introduce evidence, direct or rebuttal, on any point not herein stipulated and which may be deemed material and necessary for the proper determination of this case."

The case involves sales made in the United States of America during the year 1922 by the petitioner, a foreign corporation. It was to the sales thus made that the *income tax* of three per centum provided for by section 10 of Act No. 2833, as amended by section 7 of Act 2926, was held by the Supreme Court of the Philippine Islands to be applicable.

SPECIFICATION OF ERRORS TO BE URGED

I

The lower court erred in not giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833 as amended by section 7 of Act 2926 of the Philippine Legislature the same interpretation as that given to the law by the Revenue Department of the United States and the Attorney-General of the United States in construing section 10 of the Act of September 8, 1916, from which the Philippine Income Tax Act (Act 2833 of the Philippine Legislature as amended) was derived.

II

The lower court erred in holding that the income received by a foreign corporation with a branch office in the Philippines from the sale of sugar in the United States was income received by it "from sources within the Philippine Islands"—

(a) when the sugar was produced or purchased by the corporation in the Philippine Islands;

(b) when the sale was made in the United States by an agent of the corporation's Philippine branch "subject to confirmation and absolute control as to price and other terms and conditions by the corporation's Philippine branch";

(c) when said income was accounted for by the

corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch."

III

The lower court erred in giving to the phrase "total net income received **FROM ALL SOURCES** within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, the same construction as if the same read: "total net income **RECEIVED WITHIN** the Philippine Islands".

IV

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands to a double tax on the same income.

V

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands, to a burden greater than that to which a domestic corporation engaged in the same business is subjected.

THE LAW

The provision of law involved herein is section 10 of Act No. 2833, the Philippine Income Tax Law, as amended by Act No. 2926 of the Philippine Legislature, the pertinent portion of which reads as follows:

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from *all* sources by every corporation, * * * organized in the Philippine Islands, * * * a tax of three per centum upon such income, and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all *sources within the Philippine Islands* by every corporation * * * organized, authorized, or existing under the laws of any foreign country."

Bearing upon the proper construction of said section 10 of Act 2833 as amended are sections 12 (a) and 12 (b) of the same Act, the first relating to deductions allowable from the income of domestic corporations and the latter relating to deductions allowable from the income of foreign corporations doing business in the Philippine Islands. Under section 12 (a) a domestic corporation, in ascertaining its net income may deduct all the ordinary and necessary expenses paid within the year in the maintenance of its properties, including rentals pertaining to its agency in the United States. Under section 12 (b) a corporation organized under the laws of a foreign country, such as petitioner herein, is not

allowed to deduct from its gross income, expenses incurred by it in the maintenance of its agency in the United States, but only the expenses incurred by it in connection with its business and property including rentals for such property *within the Philippine Islands.*

ARGUMENT

I

The lower court erred in not giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, the same interpretation as that given to the law by the Revenue Department of the United States and the Attorney-General of the United States in construing section 10 of the Act of September 8, 1916 from which the Philippine Income Tax Act (Act 2833 of the Philippine Legislature as amended) was derived.

The case necessarily turns upon the meaning of the expression "sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926. This section of the Act was taken from and is an exact copy of section 10 of the United States Revenue Act of 1916, in which Act it was first used. There are no judicial decisions interpreting this expression as it is found in these Acts, other than the one herein sought to be reviewed. However, the Attorney-General of the United States, in a comprehensive opinion dated November 3, 1920, reported in Vol. 32, Opinions of the Attorney-General of the United States, at pages 336, *et seq.*, has held that income which may accrue to a foreign corpora-

tion by the sale of merchandise purchased in the United States, but sold outside of the United States was not income from "sources within the United States". The language used was as follows:

> "No income is derived from the mere manufacture of goods; before there can be income there must be a sale; and there is no income from sources 'within the United States from goods manufactured here (United States) unless there is, in the language of the statute, both manufacture and disposition of goods within the United States'. The purpose of the 1918 statute is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, without being disposed of by the owner in this country (United States). When the corporation manufactures or partially manufactures articles in this country (United States), but does not sell them until they are taken abroad, there is no income 'from sources within the United States.' For the reasons given it is concluded that income which may accrue to a foreign corporation by the sale of merchandise purchased in the United States, but sold outside of the United States, is not income from 'sources within the United States.' "

That ruling by the Attorney-General was immediately accepted and followed as correct by the Revenue Department of the United States (Treas. Dec. 3111, Cu-

mulative Bulletin, Vol. 4, p. 280.) The entire opinion was later reconsidered by the Attorney-General of the United States and confirmed in its entirety in an opinion dated January 21, 1924 (34 Ops. Atty. Gen [U. S.] 93) in the following words:

> "After a full consideration it is my opinion that the former opinion of the Attorney-General (32 Op. Atty. Gen. 339) is a correct and true interpretation of the *Revenue Acts of 1916*, 1917, and 1918, with respect to the net income received from all sources within the United States by every foreign corporation • • •"

The latter opinion likewise received the approval of the Treasury Department of the United States. (Treas. Dec. 3376, Cumulative Bulletin III-1, pp. 211, *et. seq.*)

Now, the contemporaneous construction of a statute by those charged with its execution, as has been repeatedly stated by this Court, is entitled to great weight and should not be disregarded or overturned except when clearly erroneous (U. S. v. Johnston, 124 U. S. 236, 31 U. S. (L. Ed.) 389), the reason being that the officers concerned are usually able men and masters of the subject and not infrequently they are the very men who have drafted the laws they are afterwards called upon to interpret. (U. S. v. Moore, 95 U. S. 763, 24 U. S. (L. Ed.) 589; Brown v. U. S., 113 U. S. 571, 28 U. S. (L. Ed.) 1080; Heath v. Wallace, 138 U. S. 582, 34 L. Ed. 1068; U. S. vs. Hammers, 221 U. S. 220, 55 L. Ed. 710.) This principle of law, Judge Brewer aptly ob-

served in U. S. v. Union Pac. R. Co., 37 Fed. 551, since it was first announced by Justice Trimble in 1827, has gained strength every time it was again considered by the courts.

The Supreme Court of the Philippine Islands, however, instead of adopting the construction given to the law by the Attorney-General of the United States and the Treasury Department of the United States, as it was, we respectfully submit, its plain duty to do, and *without attempting to criticize the soundness thereof, or adducing any reasons why it should not be followed*, laid down in its decision herein a doctrine diametrically opposed thereto. In so doing it committed what appears to us clear error. As Mr. Justice Street has said in his dissenting opinion:—

> "In dealing with a statute adopted by the Philippine Legislature from an Act of Congress we should be careful to take the law with the interpretation placed upon it by competent authority in the United States; and special care should be taken about this in dealing with the intricate matters covered by the income-tax laws. Our endeavor should be to cooperate, as far as possible, with the Revenue Department of the United States, in making the operation of these laws just and uniform.
>
> "The opinions of the Attorney-General of the United States to which reference has been made sustain the proposition that when merchandise is purchased or produced in one country and sold in another, the place of sale is to be taken as the

> place of the source of income for the purpose of applying a law such as is under consideration in this case; and it will be noted that the ruling thus made arose upon facts where the conclusion reached was contrary to the interests of the Government revenue—a circumstance which indicates that probably no strong considerations in favor of the Government were overlooked." (Record, pp. 58-59).

The error into which the lower court had fallen becomes the more patent, considering that the Congress of the United States in later enactments on the same subject (subsection (e) of section 217 of the Revenue Act of 1921 and subsection (e) of section 217 of the Revenue Act of 1924) adhered to and ratified the doctrine announced by the Attorney-General of the United States in the following words:

> "gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from sources within the country in *which sold.*"

II

The lower court erred in holding that the income received by a foreign corporation with a branch office in the Philippines from the sale of sugar in the United

States was income received by it "from sources within the Philippine Islands"—

(a) when the sugar was produced or purchased by the corporation in the Philippine Islands;

(b) when the sale was made in the United Sates by an agent of the corporation's Philippine branch "subject to confirmation and absolute control as to price and other terms and conditions by the corporation's Philippine branch";

(c) when said income was accounted for by the corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch".

III

The lower court erred in giving to the phrase "total net income received **FROM ALL SOURCES** within the Philippine Islands" used in section 10 of Act 2833 as amended by section 7 of Act 2926 of the Philippine Legislature the same construction as if the same read "total net income **RECEIVED WITHIN** the Philippine Islands."

Section 10 of Act 2833 of the Philippine Legislature as amended does not impose a tax upon all the income of a foreign corporation *received* by it *within* the Philippine Islands. What is taxed by the Act is the income received by such a corporation from *sources within* the Philippine Islands.

The natural, ordinary and familiar meaning of the word "source" conveys the idea of *origin*, and it is according to this popular signification that the term as used in the statute, particularly a tax statute, should be construed.

The income of a corporation engaged in the production or purchase of tobacco, sugar, copra and oil, for sale outside the Philippine Islands, such as petitioner herein, is due to a series of transactions beginning with the decision of petitioner's executive officers in the Philippine Islands, to buy or produce tobacco, sugar, copra, or oil; the actual purchase or production of the same; the shipment of these products to the United States and their storage there until sold; the efforts of petitioner's agency in the United States to find a prospective customer; the preliminary negotiations with the customer when found, leading up to a firm offer by the latter; tne transmission of the offer to petitioner's Philippine branch for sanction; the sanction or confirmation of the offer; the acceptance *by petitioner's agency in the United States* of the offer confirmed; *the actual sale, which is perfected and consummated in the United States;* the collection of the purchase price; the transfer of the proceeds to the petitioner's Philippine branch; and the entry of the income made thereby, in the books of account of petitioner's Philippine branch. By a forced construction, each and all of these diverse activities may be considered the source or origin of petitioner's income, since if one of these steps were omitted there would necessarily be no income forthcoming. Indeed, we may even go back and assign the original decision of the pe-

titioner's company in Spain to establish a branch office in the Philippine Islands as the source of petitioner's income, or we may take into consideration the fact that all the income received by the petitioner in the Philippine Islands eventually finds its way to Spain, where the main office of petitioner is located, and is accounted for in account books kept by the petitioner in that country.

It is respectfully submitted, however, that such is not the sense in which the term "source" is used in section 10 of Act 2833 of the Philippine Legislature, as amended. As used therein, the income of petitioner from a single transaction has only one source, and if that source be in the United States it cannot at the same time be situated in the Philippine Islands or elsewhere. Out of these multitudinous activities, that should be selected which brings the income from petitioner's property to fruition, and wherever that transaction was consummated, in that place lies the source of petitioner's income. A different construction such as that adopted by the lower court would wipe out the distinction made in the law with regard to the basis upon which the incomes of domestic and foreign corporations are to be taxed, for there can not possibly be a transaction effected in another jurisdiction by a foreign corporation doing business in the Philippine Islands which cannot be linked in some way with a previous or subsequent transaction, the situs of which is in the Philippine Islands.

This Honorable Court has defined income as "the gain derived from capital, from labor, or from both combined." (Stratton's Independence *v.* Hobert, 231 U. S.

399.) This definition has been extended so as to include "profit gained through a sale or conversion of capital assets". (Eisner v. Macomber, 252 U. S. 189; Merchant's Loan & Trust Co. vs. Smietanka, 255 U. S., 509; Doyle v. Mitchell Brothers, 247 U. S. 179.) There are, therefore, under this definition, only three possible sources of income: (1) capital, and/or (2) labor, and /or (3) sale of capital assets. Hence, in determining the source of a given item of income, the nature and location of the activities or property which produced the income is the controlling factor. If the income is from labor (services) the place where the labor is done is decisive; if the income is from capital, the place where the capital is employed is decisive; if the income is from the sale of capital assets, the place where the sale is made is likewise decisive. (Holmes, Federal Taxes, Sixth Ed. p. 396.

In the case at bar a part of plaintiff's working or revolving capital was employed in the United States. It was therein represented by raw materials and by stocks of partly finished and unfinished products, and if, thru the skill, ingenuity and sound judgment of from a combination of any or all of these factors, plaintiff's agents there were able to effect sales at a profit acceptable to plaintiff the profit thus received was income from sources within the United States, and not from sources within the Philippine Islands. The source of the profit thus received by petitioner was obviously situated "within the United States" and not "within the Philippine Islands."

The mere fact that the sale was made by an agent

in the United States "subject to confirmation and absolute control as to price and other terms and conditions" does not transform the sale into one made in the Philippine Islands, for these are merely rights incident to ownership and are inherent in every sale made through agents. As Mr. Justice Johnson has said in his dissenting opinion (R. p. 56.)—

> "The sale was made in the United States as per the stipulated facts and admission of the Attorney-General. The control of the sale as to price, etc., does not change the *place* of the sale of the merchandise. The Philippine branch of the plaintiff corporation simply took the precaution of having full control of the acts of its agents in the United States. The condition would have been exactly the same had the principal accompanied the merchandise to the United States and sold it. The sale by the agent does not change the place of sale. Corporations can only act through their agents."

Likewise, the circumstance that petitioner's income from the sale of the sugar, tobacco, copra and oil in question was accounted for by the corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch" is indicative of the fact, which is freely admitted by petitioner, that said income was *received by it within* the Philippine Islands but *not* that it received said income *from sources within* the Philippine Islands.

IV

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands to a double tax on the same income.

As we have already stated, the income derived from the transactions described in the stipulated facts of this case is taxable in the United States under the decisions and rulings of the Treasury Department as being "income from sources within the United States". (32 Ops. Atty. Gen. (U. S.) p. 336; 34 Ops. Atty. Gen. (U. S.) p. 93; Treas. Dec. 3111, Cum. Bulletin, Vol. 4, p. 280; Treas. Dec. III-1, p. 211.)

Under the decision of the Supreme Court of the Philippine Islands the petitioner is also required to pay a tax upon the same income in the Philippine Islands.

While there is nothing in the Philippine Organic Act (Act of Congress of August 29, 1916) prohibiting the imposition of double taxation, the taxation twice of the same income is contrary to all sound principles of taxation, is inherently unjust and unfair, and "ought wherever possible to be prevented". (Buck v. Beach, 206 U. S. 392, 51 L. Ed. 1106, 11 Ann. Cas. 732; Holmes, Federal Taxes, Sixth Ed., p. 398, quoting from Kidd v. Alabama, 188 U. S. 730, at p. 732). It can be prevented in this case, as we have already seen, by giving to the expression "sources within the Philippine Islands" used in section 10 of Act 2833 of the Philip-

pine Legislature its natural, ordinary and familiar meaning, sanctioned and approved in authoritative rulings repeatedly announced by the Treasury Department and by the Attorney-General of the United States.

V

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands, to a burden greater than that to which a domestic corporation engaged in the same business is subjected.

We have seen that the decision of the lower court if allowed to stand would subject to the tax all the income received within the Philippine Islands by foreign corporations doing business there, to the same extent as domestic corporations, irrespective of the source of that income.

At the same time, the allowable deductions to foreign corporations, compared with the allowable deductions of domestic corporations are very much restricted, for while a domestic corporation may deduct from the gross amount of its income all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals, pertaining to its agency in the United States, the deductions allowed a foreign corporation is limited to expenses in connection *with its business and property*

including rentals for such property *within the Philippine Islands.*

This results from the provisions of the first paragraphs of sections 12 (a) and 12 (b) of Act 2833 which read as follows:

"SEC. 12. (a) In the case of a corporation, joint stock company, partnership, joint account (*cuenta en participacion*), association or insurance company, organized in the Philippine Islands, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payment for the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

"(b) In the case of a corporation, joint-stock company, partnership, joint account (*cuenta en participacion*), association, or insurance company, organized, authorized, or existing under the laws of any foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources within the Philippine Islands—

First. All the ordinary and necessary expenses actually paid or deducted within the year out of earnings in the maintenance and operation of its business and property *within the Philippine Islands*, including rentals or other payments for the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

No lengthy argument is necessary to show that if the construction given to the law by the Supreme Court of the Philippine Islands is to prevail, the law is void as constituting a denial of the equal protection of the law

guaranteed to all persons in the Philippine Islands by the Jones Law (LeCraft v. Texas Co., 281 Fed. 918; Southern R. Co. v. Greene, 216 U. S. 400), since the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in the Philippine Islands would not correspond, and bear a reasonable relation, to the difference in the basis of the tax. If the petitioner is a person within the jurisdiction of the Philippine Islands, and it is no longer open to discussion that it is (Pambeña Consol. Mining etc. Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Gulf, etc. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Blake v. McCluy, 172 U. S. 239, 43 L. Ed. 432), it is entitled to stand before the law on equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, all other persons in a like situation. It may not be arbitrarily discriminated against without any real or substantial basis therefor, such arbitrary selection not being justifiable as an exercise of the right of classification of the subjects of taxation. (Gulf etc. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92; Connody v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679.)

In conclusion, therefore, we respectfully submit that to give sections 10 of Act 2833, as amended by section 7 of Act 2926, the construction placed upon it by the Supreme Court of the Philippine Islands would render it unconstitutional and void as being an unjust discrimination against foreign corporations.

CONCLUSION

For these reasons we ask the allowance of the writ of certiorari prayed for in this matter.

Manila for Washington, D. C., June 20, 1928.

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